STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 24, 2006
v	No. 257459 Oakland Circuit Court
MAYNARD DAVID ARDITO, Defendant-Appellant.	LC No. 2004-195460-FC

Before: Sawyer, P.J., and Wilder and H. Hood*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a)(victim under the age of thirteen). The trial court sentenced him as a second habitual offender, MCL 769.10, to concurrent terms of 10-1/2 to 30 years' imprisonment for each conviction. We affirm.

Defendant and his live-in girlfriend socialized with the victim's parents. He began babysitting the victim when she was seven years old. One evening in late February 2004, when the victim was nine years old, defendant babysat her and her younger brother at his house. The victim testified that defendant placed his hand under her underwear and put his finger inside the "private part" that she uses to "go to the bathroom." The victim explained that defendant had engaged in this act with her on another occasion when she was seven years old, but she did not tell her mother after the first incident because she was scared. The victim's mother testified that, two days after defendant babysat the victim in February 2004, she disclosed that defendant had sexually assaulted her and described two incidents. The victim's mother discussed the allegation with defendant's girlfriend and called protective services and the police.

Theresa Hanback, a friend of both defendant's girlfriend and the victim's mother, testified that she was at defendant's home when the victim's mother telephoned and talked to defendant's girlfriend, who then left the home. After his girlfriend left, defendant expressed that he was nervous and felt sick to his stomach. He indicated that he was probably in trouble related to the victim. He then claimed that, when he babysat the victim in February 2004, the victim threatened to tell her mother that he did "something bad," unless he agreed to play a video game with her.

I

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Defendant first argues that he was denied his right to a fair trial by the admission of the testimony of the victim's mother detailing the victim's disclosure of sexual assault. Defendant contends that the challenged testimony was hearsay and did not meet the "tender years" exception to the hearsay rule, contained in MRE 803A. While defendant phrases this issue in constitutional terms, evidentiary errors fall into a category of nonconstitutional error. *People v Herndon*, 246 Mich App 371, 402 n 71; 633 NW2d 376 (2001). In general, the admission of evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Here, however, we conclude that the issue is waived.

Waiver is the "intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Waiver is available in a broad array of constitutional and statutory provisions, and a lawyer has full authority to manage the conduct of trial and make decisions pertaining to the conduct of trial. *Id.* at 217-218. Decisions regarding the admission of evidence are matters of trial conduct or strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). At trial, the prosecutor asked the victim's mother about her disclosure, and defense counsel interrupted her testimony. While a portion of the record was not transcribed because it was inaudible, it is clear from the record that defense counsel recognized that the testimony was being offered under MRE 803A and that the testimony was admissible under that rule only if it related to the first disclosure. After the prosecutor confirmed that the testimony was related only to the first disclosure, defense counsel affirmatively indicated that it was "all right." Counsel's acknowledgment that the testimony could therefore be received affirmatively waived any objections to the testimony, thereby extinguishing any error. *Carter, supra* at 215. Consequently, there is no error to review. *Id.* at 219.

II

Defendant additionally argues that counsel was ineffective for failing to object to the testimony of the victim's mother regarding the victim's disclosure. Our review of the ineffective assistance claim is limited to errors apparent on the record because no *Ginther*[1] hearing was held. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To establish ineffective assistance of counsel, a defendant must show that: 1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; 2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and 3) the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Under this standard, defendant must show that, if defense counsel had objected to the testimony of the victim's mother under MRE 803A, there is a reasonable probability that the jury would have acquitted him of the charges. Defendant bears the heavy burden of overcoming the presumption that counsel's representation was effective. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). He must also overcome the presumption that counsel's performance constituted sound trial strategy. *Riley, supra* at 140.

[1] *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

In this case, defendant has not demonstrated that counsel's performance fell below an objective standard of reasonableness. Defense counsel is not required to make futile objections. *People v Wilson*, 252 Mich App 390, 393-394, 397; 652 NW2d 488 (2002). On the record before us, any objection to the challenged testimony based on MRE 803A would have been without merit. MRE 803A provides:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.
>
> If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

Defendant argues that the victim's statements to her mother failed to meet the second and third elements of the evidentiary rule. We disagree.

At trial, the victim's mother testified that the victim's disclosure was made two days after the second incident while they were watching television. The victim disclosed the sexual abuse without any prompting, and there was no indication that the details of abuse were suggested to the victim before she made her disclosure or that the disclosure was prompted by leading questions. The record supports that the victim's statements were made spontaneously, without indication of manufacture.

We reject defendant's claim that his statements to Hanback on the night of the disclosure require a finding that the victim's statements may have been manufactured. Hanback testified that, after defendant's girlfriend left his home in response to the telephone call from the victim's mother, defendant made statements to her. In relevant part, he claimed that, while he was watching the victim, she threatened to allege that he did "something bad" to her if he did not play a video game. Defendant's self-serving statement was made after the victim's disclosure to her mother, which disclosure prompted the telephone call to defendant's girlfriend. Moreover, the victim testified that she did not remember having such a conversation with defendant. She told defendant that she planned to tell, but she did not care about playing a video game. Rather, she said that she cared about what had happened to her. Based on the record before us, we conclude that the victim's statement to her mother was spontaneous, and was made without indication of manufacture.

Additionally, the victim's delay in reporting the incidents was excusable. A delay in reporting is excusable if it is based on a fear of reprisal. *People v Hammons*, 210 Mich App 554, 558; 534 NW2d 183 (1995). In *People v Dunham*, 220 Mich App 268, 272; 559 NW2d 360 (1996), this Court found that a delay of eight or nine months was excusable because of the victim's well-grounded fear of the defendant. In this case, there was evidence that the victim was scared after the first incident. She tried not to show her fear to her mother and kept it to herself, going to her room when she felt scared. After defendant assaulted the victim a second time, she decided to tell her mother. There was evidence that the victim told her mother two days later, and thereafter became hysterical. She was afraid that defendant's girlfriend, with whom she had a great relationship, would be angry with her. This evidence supports that the two-day delay in reporting the second incident was excusable because the victim was afraid of reprisal from defendant's girlfriend. Moreover, the delay in reporting the first incident was also excusable; the record discloses that the victim did not say anything because she was scared.

Based on the record before us, an objection to the challenged testimony on the ground that it did not meet the hearsay exception of MRE 803A would have been without merit. Thus, defense counsel's conduct in failing to object did not fall below an objective standard of reasonableness. *Bell*, *supra* at 695; *Riley*, *supra* at 140.

Even if a meritorious objection existed and should have been made, defendant cannot overcome the presumption that counsel's failure to object was a matter of sound trial strategy. The challenged testimony was important to the defense strategy. It provided evidence of inconsistencies in the victim's allegations, which challenged her credibility. For example, defense counsel pointed out during her closing argument that the victim told her mother that defendant engaged in digital penetration with her "probably three times," but the victim only testified about two penetrations. Without evidence of the victim's statements to her mother, counsel's closing argument, emphasizing inconsistencies, would have been less effective. The challenge to the victim's credibility would have been weakened. Decisions regarding evidence to be presented are matters of trial strategy. *Riley, supra* at 140. We will not second-guess counsel regarding matters of trial strategy, and we will not assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

III

Defendant next claims that the trial court improperly scored offense variable (OV) 11, MCL 777.41, at 25 points. This issue was not raised before, or decided by, the trial court. However, the issue was raised in a proper motion to remand filed in this Court and, as such, it is preserved. MCL 769.34(10). Generally, we review a trial court's scoring decision for an abuse of discretion to determine whether the evidence adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). However, we conclude that this issue is waived.

At the sentencing hearing, the trial court reviewed the guidelines range with defense counsel, specifically stating that OV 11 was scored at 25 points. Counsel replied, "Correct, and I would agree with that, your Honor." Counsel's approval of the scoring of OV 11 affirmatively waived any objections to the scoring, thereby extinguishing any error. *Carter*, *supra* at 215. Consequently, there is no error to review. *Id.* at 219.

IV

Defendant claims that counsel was ineffective for failing to object to the scoring of OV 11. We disagree. Because no *Ginther* hearing was conducted, our review of this claim is limited to errors apparent on the record. *Riley*, *supra* at 139.

OV 11 provides that 25 points should be scored if "[o]ne criminal sexual penetration occurred." MCL 777.41(1)(b). The instructions for OV 11 further provide:

> All of the following apply to scoring offense variable 11:
>
> (a) Score all sexual penetrations of the victim by the offender arising out of the sentencing offense.
>
> (b) Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 or 13.
>
> (c) Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense. [MCL 777.41(2).]

The language of the statute instructs that only penetrations *of the victim arising out of the sentencing offense are scored*, but the one penetration that forms the basis of the sentencing offense is excluded. *People v McLaughlin*, 258 Mich App 635, 674-676; 672 NW2d 860 (2003); *People v Mutchie*, 251 Mich App 273, 280-281; 650 NW2d 733 (2002). In this case, there were two charged offenses and two convictions. The sentencing offense for which the guidelines were scored was defendant's first conviction for first-degree criminal sexual conduct. The victim testified to only one penetration arising out of that sentencing offense and that one penetration formed the basis of the sentencing offense. Thus, there were no additional penetrations to be scored under OV 11, and the trial court erred in assessing 25 points. *Id.* at 677.

However, OV 11, MCL 777.41(2)(b), specifically directs that multiple sexual penetrations of a victim by the offender extending *beyond* the sentencing offense may be scored in OV 12 or OV 13. OV 13 provides for a score of 50 points if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age." MCL 777.43(1)(a). Fifty points are scored if the sentencing offense is first-degree criminal sexual conduct and, in scoring OV 13, all crimes within a five-year period, including the sentencing offense, may be scored. MCL 777.43(2)(a), (d).

In this case, there was evidence to support a pattern of felonious criminal activity involving three penetrations against a person under the age of 13, including the sentencing offense, during the previous five years. The evidence was sufficient to support a finding that defendant babysat the victim on approximately 20 occasions during the two years before the victim reported the sexual assault in 2004. Defendant was charged and convicted of engaging in two separate penetrations with the victim during that time period. The victim, who was under 13 years of age, testified about these separate, felonious acts. Additionally, there was evidence of a third penetration. The victim's mother testified that, when the victim first disclosed the sexual assaults, she recounted the details of the most recent assault and indicated that the same conduct occurred a couple of times before that. The victim's mother understood that the last incident of penetration was the third incident. Thus, OV 13 may properly be scored at 50 points. *Hornsby*,

supra at 468. If counsel had objected to the scoring of OV 11, it is likely that offense variables 12 and 13 would have also been reviewed. If OV 13 had been scored correctly, defendant's total offense variable score would have been greater than that calculated at the time of sentencing.

The sentence imposed in this case did not fall outside the appropriate guidelines range. First-degree criminal sexual conduct is a Class A felony. MCL 777.16y. Defendant was sentenced as a second habitual offender, MCL 769.10, which raised the upper limit of his minimum sentence range by 25 percent. MCL 777.21(3)(a). His originally calculated sentencing guidelines range was 81 to 168 months, which reflected a prior record variable score of 15 points and an offense variable score of 45 points. MCL 777.62; MCL 777.21(3)(a). If defendant's offense variable score were raised to 70 points, based on the proper scoring of OV 13 and the elimination of the score for OV 11, the sentencing guidelines range would be 108 to 225 months. MCL 777.62; MCL 777.21(3)(a). Defendant was sentenced to a minimum term of 10-1/2 years, or 126 months. Thus, the sentence imposed was within the appropriate guidelines range.

While counsel's failure to object to the scoring of OV 11 may have fallen below an objective standard of reasonableness under prevailing professional norms, defendant cannot demonstrate that he would have received a different sentence if counsel had objected because the sentence imposed was within the appropriate guidelines range. *Bell, supra* at 695. We therefore conclude that counsel's failure to object does not constitute ineffective assistance of counsel.

V

Defendant additionally argues that the trial court erred by scoring OV 4, MCL 777.34 (psychological injury to the victim), and OV 10, MCL 777.40 (exploitation of a vulnerable victim). Citing several United States Supreme Court decisions, he argues that a trial judge may not sentence a defendant based on facts that were not submitted to the jury and proven beyond a reasonable doubt. The decisions cited by defendant are not applicable to Michigan's indeterminate sentencing system, and OV 4 and OV 10 were properly scored without the jury deciding the factual basis for the scoring of those offense variables.

Defendant's reliance on *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), is misplaced. In that case, the Supreme Court held that any fact, except the fact of a prior conviction, *which increases the penalty for a crime beyond the prescribed statutory maximum* must be submitted to the jury and proved beyond a reasonable doubt. *Id.* at 490 (emphasis added). The statutory maximum for first-degree criminal sexual conduct in Michigan, MCL 750.520b(1)(a), is life imprisonment. MCL 750.520b(2). Defendant's sentence of 10-1/2 to 30 years' imprisonment is not beyond the prescribed statutory maximum.

Similarly, defendant's reliance on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), is also misplaced. The decision in *Blakely* does not apply to sentences imposed in Michigan. *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004); *People v Wilson*, 265 Mich App 386, 399; 695 NW2d 351 (2005); *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004). As our Supreme Court observed in *Claypool*, *supra*, *Blakely* addressed a determinate sentencing system, unlike Michigan's indeterminate sentencing system. *Booker* also involved a determinate sentencing system, specifically the federal sentencing guidelines system. The Court determined that there was no distinction of constitutional

significance between the federal sentencing procedure and the Washington state procedure addressed in *Blakely*. *Booker, supra*, 125 S Ct 749. The *Booker* Court did not address an indeterminate sentencing scheme. Thus, like *Blakely*, that decision is not applicable to Michigan's indeterminate sentencing scheme.

Additionally, because the United States Supreme Court decisions are not applicable, defense counsel was not ineffective for failing to object to the scoring of OV 4 and OV 10 based on those decisions. Defense counsel is not required to make meritless objections. *Wilson, supra* at 393-394, 397.

VI

Lastly, defendant argues that reversal is required because the prosecutor failed to prove venue beyond a reasonable doubt. "Venue is a part of every criminal case and must be proved by the prosecutor beyond a reasonable doubt." *People v Fisher*, 220 Mich App 133, 145; 559 NW2d 318 (1996). However, while venue is a necessary portion of the prosecution's case, it is not an element of the crime. *People v Swift*, 188 Mich App 619, 620; 470 NW2d 491 (1991). This Court has previously held that "[n]o error lies in the prosecution's failure to affirmatively prove venue in view of defendant's failure to object." *People v Carey*, 36 Mich App 640, 641; 194 NW2d 93 (1971). Additionally, MCL 767.45(1)(c) provides, in relevant part, that "[n]o verdict shall be set aside or a new trial granted by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury."

In this case, the prosecution failed to establish venue for the charged acts of criminal sexual conduct. The prosecutor provided evidence of the location of the victim's home, but the charged conduct occurred in defendant's own home. No evidence was presented with respect to the location of defendant's home. We reject the prosecutor's argument that there was sufficient evidence of venue in the record. Specifically, we disagree that the involvement of the Milford Police Department establishes venue in Oakland County. The victim's mother testified that she called the police when she learned of the victim's allegations and was interviewed by an officer from the Milford Police Department. The choice of the victim's mother to contact the Milford Police Department does not establish the venue of the crimes beyond a reasonable doubt. Nevertheless, defendant never objected to the prosecution's failure to establish venue at any time before this appeal. Therefore, the verdict may not be set aside for failure to prove venue. MCL 767.45(1)(c); *Carey*, *supra* at 641.

Affirmed.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Harold Hood